In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, PLAINTIFF IN ERROR, v. WILLIS N. BIRDSALL.	No. 727.
THE UNITED STATES, PLAINTIFF IN ERROR, v. THOMAS E. BRENTS.	No. 728.
THE UNITED STATES, PLAINTIFF IN ERROR, v. EVERETT E. VAN WERT.	No. 729.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These cases come up under the criminal appeals act. They involve the construction of sections 39

and 117 of the Federal Penal Code (35 Stat. 1096, 1109), which are as follows:

> SEC. 39. Whoever shall promise, offer, or give, or cause or procure to be promised, offered, or given, any money or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and imprisoned not more than three years.

SEC. 117. Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof; or whoever, being an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, shall ask, accept, or receive any money, or any contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of money or value of the thing so asked, accepted, or received, and imprisoned not more than three years; and shall, moreover, forfeit his office or place and thereafter be forever disqualified from holding any office of honor, trust, or profit under the Government of the United States.

Birdsall was indicted under section 39 for having given bribes to Brents and Van Wert, who were special officers under the Commissioner of Indian Affairs, and Brents and Van Wert were indicted under section 117 for having accepted the bribes.

The material portions of the indictments against the three defendants are identical for the purposes of this appeal. In substance they allege that Brents and Van Wert were special officers for the suppression of the liquor traffic with and among Indians, duly appointed by the Commissioner of Indian Affairs; that in the performance of their official functions as provided by the rules and regulations and established usages and practices of the Department of the Interior, it was their duty to make recommendations to the Commissioner of Indian Affairs concerning all matters connected with the conviction and punishment of all persons who should violate the laws of the United States in reference to liquor traffic among Indians, and particularly to advise him, when called upon to do so, as to whether or not the enforcement of such laws would be furthered or prejudiced by Executive or judicial clemency in any particular case; that the United States judges in passing upon applications for judicial clemency, and the President in passing upon applications for Executive clemency, were accustomed to consult the United States attorney who conducted the prosecution, and through him the Commissioner of Indian Affairs, who in giving his advice was accustomed to rely upon the recommendations of his special officers, among whom were Brents and Van Wert; that Birdsall, being desirous of obtaining Executive or judicial clemency for certain of his clients who had been

convicted of violating the law in reference to liquor traffic among Indians, willfully and feloniously offered Brents and Van Wert the sums of fifty and seventy-five dollars, respectively, with the intent to influence their recommendation and advice to the Commissioner of Indian Affairs as to whether the enforcement of such laws would be furthered or prejudiced by granting clemency to the persons convicted as aforesaid; and that Brents and Van Wert willfully and feloniously accepted the sums offered for the aforesaid corrupt purposes.

Each defendant separately demurred on the ground the facts alleged against him did not constitute a crime.

The court below sustained the demurrers (Tr. 26).

ARGUMENT.

The real ground of the decision below appears to have been that the action sought to be induced by the bribe could not itself have been punished criminally. In other words, it was held that because Brents and Van Wert could not have been punished *criminally* for giving dishonest advice and false information to their official superiors, it was no crime for them to accept (or for Birdsall to give) these moneys in consideration for such dishonest advice and false information.

Passing the point that here was a criminal action at least in a conspiracy to defraud the United States

(*Curley* v. *U. S.*, 130 Fed. 1), we think it plain on the face of the sections (39 and 117, *supra*) that they do not define bribery so narrowly. They do not limit the offense to the inducement of *criminal* breaches of official duty, but cover broadly *all* breaches of such duty.

Haas v. *Henkel*, 216 U. S. 462, 480, disposes of the case. That was an indictment for conspiracy to commit bribery under the identical predecessor sections of the Revised Statutes (5451 and 5501), and the indictment was upheld even though the act sought to be induced (the giving of advance information about cotton crop reports) would not itself have been criminal.

In *Benson* v. *U. S.*, 27 D. C. App. 331, 344, 345, the same result was reached, the court saying:

> If the term "lawful duty" means only a duty imposed by law, such narrow construction of this statute might cause great doubt, for this indictment appears to admit that neither of these officials was prohibited by a statute from revealing the contents of such reports. Despite the elaborate and ingenious argument of defendant's counsel, we still hold, as this court has heretofore held, that every incidental, yet necessary, duty incumbent upon an official to perform need not be designated by statute (p. 345).

Sharp v. *U. S.* (C. C. A. 8th C.), 138 Fed. 878, and *U. S.* v. *Van Leuven* (D. C. Iowa), 62 Fed. 62, are also in point in our favor.

None of these cases appears to have been cited to the court below save *Sharp* v. *U. S.*, which was dismissed without discussion as not being in point (Tr. 31).

That the duties of Government employees may be determined by departmental usages and regulations, and are not limited to those specifically defined by statute is of course well settled.

> *U. S.* v. *Macdaniel*, 7 Pet. 1, 14.
> *Benson* v. *Henkel*, 198 U. S. 1.
> *Crawford* v. *U. S.*, 212 U. S. 183, 191.
> *Tyner* v. *U. S.*, 23 D. C. App. 356.

As was said by Judge Ward in *Haas* v. *Henkel* (C. C. N. Y.), 166 Fed. 621 (affirmed 216 U. S. 462, *supra*):

> The words "lawful duty" are not to be considered as duty imposed by law or statute, but as duty lawfully imposed in any way (p. 627).

George v. *U. S.*, 228 U. S. 14, which is chiefly relied on by the court below, merely held that an administrative officer can not give a *criminal* sanction to department rules and regulations. Of course it did not hold that the head of a department can not impose upon his subordinates all sorts of official duites (sanctioned by the usual department discipline), so long as they are appropriate to the work for which his department is responsible; as, for instance, in this case the duty of advising whether the protection of the Indians against the liquor

traffic required a heavy sentence and a refusal of Executive or judicial clemency to Birdsall's clients.

CONCLUSION.

The judgment should be reversed.

WINFRED T. DENISON,
Assistant Attorney General.

NOVEMBER, 1913.

○

Nos. 727, 728, 729.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

BRIEF FOR THE UNITED STATES ON RE-ARGUMENT.

STATEMENT OF FACTS.

These three cases are being heard as one. They are in this court on writs of error sued out by the United States to the district court for the northern district of Iowa to review its decision sustaining

demurrers to indictments. The indictment in No. 729 (*United States* v. *Everett E. Van Wert*) was filed December 4, 1912. It involves a charge of accepting a bribe contrary to section 117 of the Criminal Code (R., p. 1 to 5) and charges in substance, that on March 30, 1910, and for more than a year before, defendant Van Wert was acting for and in behalf of the United States in an official capacity as a deputy special *officer* for the suppression of the liquor traffic with and among Indians under authority of the Department of the Interior of the United States, having been duly and legally appointed by the Commissioner of Indian Affairs under authority of the Secretary of the Interior; that under the regulations and usages of said department as such officer it was his duty to make true recommendations and give honest advice to said commissioner concerning the conviction and punishment of persons violating said liquor laws, and, particularly, as to the effect of judicial or executive clemency in any case on the suppression of the traffic generally; that nine named persons plead guilty in 1909 to having violated said liquor laws, and each was sentenced to 60 days imprisonment and $100 fine; that an application was made to the judge of the trial court for reduction and suspension of the sentences, whereupon the judge announced that he would not reduce or suspend them unless said commissioner and the United States Attorney should recommend it to him, and the latter declined to so recommend unless said

commissioner should in turn recommend it to him; that in order to give time to secure these recommendations, if they could be secured, the judge of said court held the execution of these sentences in abeyance; that it was a usage and custom for the trial judge to consult the United States attorney and the administrative officers of the Indian Bureau in such matters, and for the President to consult the Attorney General and the latter to consult the district attorney in matters relating to the exercise of Executive clemency in such cases; and that one Birdsall, an attorney for the convicted persons, determined to seek these recommendations, and on May 30, 1910, defendant Van Wert unlawfully, willfully, corruptly, and feloniously received from Birdsall $75 with the intent by receiving the same to be influenced thereby as to his action on a question, matter, cause, and proceeding then and there expected and intended soon to be pending before him, and then and there expected soon by law to be brought before him in his official capacity and in his place of trust and profit. The last allegation is explained under a *videlicet* as being that when the said commissioner should call on him for information, report, and recommendation as to whether the matter of suppressing this liquor traffic would be aided or retarded, Van Wert, under the influence of money, should falsely and without regard to the truth mislead and misinform said commissioner and advise him that under the facts and circumstances known to said Van

Wert leniency and clemency should be granted said persons, and that in the interest of the enforcement of the laws for the suppression of said liquor traffic said commissioner should recommend to said judge, said United States attorney, the Secretary of the Interior, the Attorney General, or the President that leniency and clemency should be granted them and that their sentences should be commuted to a fine without imprisonment.

No. 728 (*United States* v. *Thomas E. Brents*) is in all respects like No. 729, *supra*, save that the act is charged to have been committed a month earlier and the amount accepted to have been $50.

To each of these indictments a demurrer (similar) was interposed on the ground (in substance as follows): That the facts averred do not constitute a crime and the deficiencies in this regard were specified as follows:

> (*a*) Failure to aver defendant was an officer of the United States, or acting on its behalf in his official function, or by authority of any department or office of the Government, or that he accepted money or value with intent to influence him while so acting.
>
> (*b*) Failure to aver that when he was said to have accepted a bribe any question was pending before him in his official function.
>
> (*c*) Failure to aver that in the receipt of $75 he was to be influenced in any official decision or action or to collude with others or aid them to defraud the United States, or to omit any duty or do any act against

the Constitution or laws of the United States, or the practices or regulations of any department thereof.

(*d*) Failure to show any usage or regulation to consult defendant as to reduction or suspension of any sentence, judgment, or penalty when imposed by any judge of the United States for violation of the Indian liquor laws; or that it was defendant's duty thereunder to recommend or advise the Indian Commissioner, Secretary of the Interior, Attorney General, or United States attorney on a conviction for violating said laws, and that he received the money intending to be influenced in any decision of his as above.

(*e*) Failure to aver violation of any law or regulation of the United States or any department thereof whose violation is declared a crime.

Many of these grounds are laid in the very teeth of positive averments in the indictment. This is due to the fact that the indictments in these records are second and corrected indictments. (R. No. 727, pp. 22–25.)

Case No. 727 comprehends two indictments consolidated in the court below. These were against the attorney, Birdsall, charging him with offering the bribe to each of the others. The first indictment, in substance, avers the official character of Van Wert, his duties, the conviction of the nine men, the judge's attitude on request for clemency and stay of sentence, the usage as to action of the

President, commissioner, Attorney General, and the district attorney, the relation of Birdsall to the defendants and his purpose as to the recommendation insisted on by the judge, all in manner as averred in the other two indictments. And then, with similar adjectives, avers that Birdsall, then knowing Van Wert's official functions and relations, offered the $75 with intent to influence him thereby to so act as it is charged in the other indictment Van Wert meant to act upon taking the money. The second count is like the first, save that it merely charges that Birdsall meant to influence Van Wert's action in his official capacity without detailing the method. The second indictment also contains two counts, each similar to its corresponding count in the first, save that it relates to the bribery of Brents by offering him $50 a month earlier. (No. 727, R., pp. 1–15.) The demurrer in the latter case (No. 727, R., pp. 15–17) was upon the following grounds:

> (1) Failure to aver facts constituting a crime.
>
> (2) Failure to charge bribery or other offenses in detail, as follows:

Here follows the specific grounds complained of in the demurrer as to corresponding allegations in the Van Wert indictment with here the additional ground that Van Wert was not a court employee; that no duty was imposed on him by law, usage, or regulation to advise any court or judge as to the reduction, change, or suspension of the sentences

for violation of the liquor laws, or to recommend clemency in that regard; that he had no power to determine or decide any such question; that neither the court nor its judge would be under any obligation to heed or to be governed by any such advice or recommendations, which would be but the advice and recommendations of a private person; and that such advice by an employee of one department to an officer of another coordinate branch of the Government would violate public policy and the long-established usages of the respective departments. No demurrer to the indictment for bribing Brents appears in the record. This may be due to the consolidation. Because the statutes involved, sections 39 and 117 of the Judicial Code, are quoted in the original brief they are not repeated here.

ARGUMENT.

Brief is filed for the defendant Birdsall alone. To support their ultimate contention that the indictment against Birdsall states no crime, counsel (brief, pp. 12–13) make five points. Boiled down, however, they represent but two:

1. Congress can not constitutionally give to an officer or employee of an executive department power to discharge judicial functions.

2. Departmental regulations or usages are only effective within the particular department enacting or observing them. And so, no regulation or usage of the Interior Department could make it an official duty of any officer or employee of that department

to advise any judge as to what sentence he ought to impose.

We at once concede point 1. The power to finally fix a sentence is a judicial power; and were Congress to declare that the Secretary of the Interior should be empowered to determine the sentence of all persons convicted of violating Indian liquor laws, and further declare that the judge of the trial court must impose that sentence, so determined, and no other, everyone will agree that the act would be void.

We also agree that departmental regulations and usages are effective only within the department making them. But this only means that the Secretary of the Interior can not by regulation impose any *duty* on a *judge* that the latter is bound to perform. Under section 463, Revised Statutes, the Commissioner of Indian Affairs has the "management of Indian affairs," and of all "matters arising out of Indian relations"; and under section 161 the Secretary of the Interior may prescribe regulations, consistent with law, for the government of departmental business, and the conduct of its officers and employees. Neither the commissioner nor the Secretary can personally investigate individual violations of the Indian liquor laws or even the general conditions surrounding the traffic. To intelligently administer, the commissioner must get the facts through others. Every phase of the question may be reached by him through examination conducted by his subordinates and reports

from them. By regulation, and usage (having the force thereof), he has imposed on them the duty to advise him whether they consider the suppression of the liquor traffic would be aided or hindered by reduction or suspension of sentence in the case *of individual violators.* In *United States* v. *Bailey* (9 Peters, 254, 255), this court said:

> And we are of the opinion that the Secretary of the Treasury did by implication possess the power to make such a regulation * * *. It was incident to his duty and authority in settling claims under that act. The third section provides: "That the Secretary of the Treasury be, and he is hereby, directed and required to adjust and settle those claims," etc., * * *. It is a general principle of law in the construction of all powers of this sort that where the end is required the appropriate means are given. It is the duty of the Secretary to adjust and settle these claims, and in order to do so he must have authority to require suitable vouchers and evidence of the facts which are to establish the claim * * *. It can not be presumed that Congress were insensible of these considerations or intended to deprive the Secretary of the Treasury of the fullest use of the best means to accomplish the end, viz, to suppress frauds and to ascertain and allow just claims.

See also *Lewis Publishing Co.* v. *Wyman* (182 Fed., 13, 16); *Leonard* v. *Lennox* (181 Fed., 760); in re *Naegle* (39 Fed., 833, 860).

He might make this the basis of a recommendation to the Secretary of the Interior, and the latter in his report might recommend legislation to Congress prohibiting suspension of sentence in any such cases. If the commissioner had no thought of making suggestions to the United States Attorney or the judge about any sentence, but had prescribed these duties for his own information, these regulations would create duties as effectually as if Congress, by specific act, had prescribed them. Does the fact that the information would become the basis of a recommendation by him to the United States Attorney and the judge (should either indicate a desire for it) make the acts of defendants Van Wert and Brents, done under the regulations and usages, any the less official in their character? The United States Attorney can not investigate the probable influence of suspension of sentence in a given case, or the suppression of the traffic as a whole. He must obtain such information from those who are equipped to furnish him the facts and suggestions. This is true of the judge in a larger degree. His is the power and duty to finally fix the sentence. He acts judicially in the light of existing facts and conditions that would influence an intelligent mind. The common practice before sentence is to call on the district attorney to advise him as to the facts as they have appeared to the attorney. He may hear the defendants or his counsel or even take evidence. He is bound by nothing that he hears, but merely aided thereby. If asked to sus-

pend sentence, should he not have a reason for his discretionary action? Would he not take judicial notice of records in the Interior Department—such as reports, if any there were, from the commissioner to the Secretary covering the advisability of suspending sentence in such cases, or in particular class of cases? The infirmity of defendant's argument lies in the assumption, first, that the judge must be bound to follow the recommendation before it can be said that the recommendation of the officers to the commissioner is an "action in an official capacity," and, second, that there is identity between the matter to be decided by the defendant officers and with that to be decided by the judge. The latter alone can determine the final sentence and the question of suspension. The former make up their mind whether the *suppression of the liquor traffic would be aided or hurt if* a trial court *should* suspend sentence in a given case. They advise the commissioner of their views. The ordinary operations in the exercise of the pardoning power presents an analogy. The President, as the head of the executive department, finally decides whether a pardon shall or shall not be granted. In the judicial department official records are kept of the facts of the prisoner's case, his prison conduct, and his claims for pardon. Various subordinate officers make recommendations from time to time upon these various phases of the question. The Attorney General upon the files so assembled makes final recommendation to the President. Can it be

doubted that every such recommendation is an official act; or that an attempt to induce corrupt recommendation any where in the course of the flow of this official action would violate section 39? The Attorney General gives opinions on matters of law to the President and to the heads of executive departments upon facts actually submitted to him. The latter are assembled with recommendations through successive subordinates to the head of the department. The Attorney General on receipt of the request submits the question to assistants for investigation and report. If on either side—in the executive department before a submission, or in the judicial department in the course of the investigation for opinion—money be offered to influence a recommendation or report, would not this be a violation of section 39, although the final decision upon the large matter in which these various smaller questions transpired rested solely with the head of the executive department? These suggestions make it plain that there may be many questions themselves requiring decision or action that may spring from larger questions requiring ultimate decision or action. The latter may be in one department, and the subordinate matters requiring decision or action may be in other and different departments. None the less are all of them within the protection of this act.

Defendants contend that the act punishes a decision *only* upon the *ultimate* question: "Should judicial clemency be exercised"; and that none

save the judge can determine this question. The latter statement is correct, but the former is not. The act does not say *final* " decision " or *final* " action." It reaches anything involving any action, whether initial, intermediate, subordinate, or final, provided that action be taken in an official capacity. A bribe to the judge to wrongly decide a question of judicial clemency would be reached by the act, they confess. Equally so, we insist, is a bribe to induce the special officer to give dishonest recommendation. The special officer must be left as free of money influence in determining what recommendation he will officially give the Commissioner, as must the latter in determining what recommendation he will give the district attorney and the judge, or as must the judge in determining what final action he will take on the general question before him.

In *Sharp* v. *United States* (C. C. A., 8th Circt., 138 Fed., 878) an Indian agent was indicted for accepting a bribe to influence his action on land leases. The act of Congress provided that lands *could* be leased in such quantities and on such terms as the agent should recommend. The bribe was to influence to dishonestly recommend. Held, that he was in a position of trust and guilty under the act. Of course, in this case power to recommend was bestowed by act of Congress. But the case is cited to the point that it is not necessary that the deputy officer should make any *final* decision to come with-

in reach of the bribery statute. A *recommendation* is equally within its terms.

This brings us to the construction of the act. Its purpose, we insist, was to safeguard the honesty of official action throughout its entire flow, from the spring of initial investigation to the ultimate ocean of final disposition. Speaking of the language "action upon any matter then pending, or which may be brought before him in his official capacity," the Supreme Court of California in *People* v. *Markham* (30 Pac., 621), said:

> The *scope* of the definition of "bribery" is as *broad as the duties* of the officers who accept the bribe.

This court in *United States* v. *Bailey*, 9 Peters, 254, said:

> The policy of the act clearly extends to such a case and the public mischief to be remedied is precisely the same as if the affidavit had been taken under the express and direct authority of a statute of the United States.

To make plain the various possible readings of the statute, the following chart of words (in which those not in brackets represent the exact language of the act), is submitted:

> Whoever being an officer * * * or a person acting * * * in any official capacity * * * shall ask, accept, or receive * * * with the intent to have [(1) influenced thereby], his decision or action [(2) in any official capacity] on any question, mat-

> ter, cause or proceeding which may at any time be pending [(3) before him in his official capacity or in his place of trust or profit] or [(4) on any question, matter, cause or proceeding] which may by law [(5) pursuant to law, i. e. lawfully] be brought before him in his official capacity or in his place of trust or profit, influenced thereby, etc.

"(1)" represents a transposition of the words "influenced thereby," which is quite immaterial as under any reading they can only modify "decision or action."

"(4)" is a phrase that must be re-read under any construction.

First: Reading it with "(2)" but without "(3)". The "question," etc., need not be pending before the person taking the bribe. It is enough if he may be required to take some action officially with reference thereto, *wherever* pending. The punctuation—a slight feature, of course—encourages this reading. We are justified in reading in "(1)," to limit it to "official capacity"; because the personal pronoun "his" in the clause "his decision or action" relates to "officer or person acting in any official capacity." The word "pending" means undecided or undetermined. (*Sanford* v. *Sanford,* 28 Conn., 6, 20; *Wentworth* v. *Farmington,* 48 N. H., 207, 210.) So read the statute reaches the case at bar whatever meaning be given the words "may at any time"; because the case against the nine men was then pending in court, and also because the question was there pending as to reduc-

tion or suspension of sentence, and in connection therewith (because the judge insisted upon a recommendation to himself from the Commissioner of Indian Affairs), *action*, under duties imposed by lawful regulation, might be required of the special officer. The act provides two different ways in which the matter may arise:

1. " Which may at any time be pending."
2. " Which may by law be brought, etc."

If either of these conditions obtain, the definition of the crime in this respect is satisfied. Under the first alternative it is not necessary that the matter be pending " by law," whatever these words may mean, because they are not found in this clause.

Second: Reading the statute without "(2)" but with "(3)." We see that, because no question, either general or subordinate, was *actually* before him undecided when he took the bribe, we must under this second reading determine the meaning of the words " *may at any time* " before we can lodge the case under the first alternative. Defendants contend that they must be limited to *a single time*, namely, the time of the acceptance of the bribe. We submit the words " at *any* time " are positively opposed to the idea of *one single* time. Had Congress intended to so limit the time the natural language would have been " *then pending.*" (" Then pending " was used in the California statute under consideration in *People* v. *Markham, supra.*) Courts have given the words " at any time " their natural, broad meaning. (*Elkins* v.

Wolfe, 44 Ill. App. 376, 380; *Raymond* v. *Wathen,* 142 Ind., 367 (41 N. E. 815, 816); *In re Miller's Estate,* 22 Atl. 1044 (Pa.); *Schroeder* v. *Gemeiner,* 10 Nev. 355, 361.) This question was suggested but not decided in *Benson* v. *Henkel* (198 U. S. 1, 11). It was there said that a commissioner need not consider it, since it was peculiarly a question to be determined by the court in which the indictment should be found. Seeking the intention in the light of the evil sought to be remedied, Congress must have had in mind that a prior corruption would work as great harm, as to a matter later to come before the official, as it would in the case of a matter *already* before him. (*U. S.* v. *Bailey,* 9 Peters 254, *supra.*) If the words " may at any time " refer to possible *future* pendency then this case is still reached by the first alternative clause. Only by reading in the insert "(3)" and by substituting the words " then pending " in place of " may at any time be pending " can the case at bar be read out of its reach.

Third: In the event the last suggested reading of the first alternative clause be adopted we must turn to the *second* alternative. The words " may * * * be brought " deal with the *future.* The court so held in *People* v. *Markham, supra.* And, in a case (which at first examination might be deemed a strong one for defendants, though not cited in their brief), which construes the *very* language of the second alternative in this act (*State* v. *Butler,* 77 S. W. 572), the Supreme Court of Mis-

souri decides not only that the matter *need not be then* before him, but that the clause is satisfied if the matter *may*, at any time in *future, possibly* come before him, and this *even though the matter in fact never does reach him.*

It remains but to consider the force of the words "*by law*" in this second alternative clause. We believe they should be read as "pursuant to law" or "lawfully" or "in a lawful manner"; rather than as "under the mandate of an act of Congress expressly imposing specific duty in this regard on the bribe taker." In *Lindsley & Phelps Co.* v. *Mueller* (176 U. S. 126, 136–137) this court was asked to hold that the words "chartered by law" required a charter under a *specific* act naming a *particular* corporation. It declined to attach this meaning to the words "by law" and held that a corporation organized under a power given by a general incorporation act was within the reach of the statute. Since in our case the duty was imposed by a regulation authorized to be made by sections 161 and 463 of the Revised Statutes the decision of this court last referred to would seem to dispose of the question.

This court has also directly decided the question as to the bribe-giving section, 39, in *Haas* v. *Henkel, infra.*

In the case of *State* v. *Butler, supra*, careless language in the opinion supports the idea that the duty must be specifically prescribed by a statute, but examination of the facts and the whole opinion shows otherwise, for they exhaustively consider

whether under the powers bestowed by its charter statute on the municipal council of St. Louis the latter could authorize a board of health to make contracts for garbage removal (p. 566). There was no pretense that the State statute undertook to impose any duties or power on the board of health. If this had been necessary under the bribery statute it would have been useless to consider whether the statute authorized the municipal council to impose such duties. The court held that because there was neither direct duty imposed on the board nor any power in the council to impose such a duty on the board the case failed. They simply decided that to meet the requirements of the words " by law " there must be existing, at the time of the imposition of the duty, some law under authority of which a duty might in some manner be legally imposed. In our case such existing law is found in sections 161 and 463, Revised Statutes, *supra*, authorizing the Secretary and Commissioner by regulation to impose such duties upon these special officers.

As sustaining this construction of the second alternative clause in section 117 (reaching the bribe taker) we may refer to its complementary statute, section 39 (reaching the bribe giver). Such a reference was made for purposes of interpretation in *People* v. *Markham*, *supra* (30 Pac. 632). Section 39 uses virtually the same language as section 117 in the respect now under review (for " function " and " capacity " are not distinguishable); and then because dealing with the

bribe giver adds " or with intent to influence him to commit or aid in committing or to collude in, or allow any fraud, or make opportunity for the commission of any fraud, on the United States, *or to induce him to do, or omit to do, any act in violation of his lawful duty.*" This supports the idea that the scope of the definition of bribery in this act was meant to be as broad as the lawful duties of the person acting in an official capacity, and that the words " by law " simply means " lawful," that is, not contrary to law.

As to the bribe-giving section, 39, this court has settled the law in accordance with this contention in *Haas* v. *Henkel*, 216 U. S. 462, 480, 481.

We do not think it should seriously be claimed that no act of an officer or person acting in an official capacity for the United States could be said to be an official act or duty unless specifically prescribed by an act of Congress. Were such the law a warehouse would be demanded to shelve the statutes. Common sense and the law alike declares otherwise. This court in *United States* v. *McDaniel* (7 Peters, 14 and 15) has said:

> A practical knowledge of the action of any one of the great departments of the Government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law, but it does not follow that he must show

> statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined and which are essential to the proper action of the Government. Hence, of necessity usages have been established in every department of the Government which have become a kind of common law and regulate the rights and duties of those who act within their respective limits.

See also *Benson* v. *Henkel* (198 U. S. 1, 12); *Crawford* v. *U. S.* (212 U. S. 189, 191).

To interpret these words as defendants insist they should be interpreted would (in the event the first alternative clause were construed to reach only matters *then* pending) so restrict the scope of the statute as to seriously impair its usefulness by leaving the entire subject of present bribery to influence action in matter to arise in the future, wholly unguarded by criminal penalty in all cases where the obligation to act was prescribed by regulation or departmental usage, rather than by the specific terms of an act of Congress.

We now analyze the cases which defendants cite as supporting their contention in this regard:

In *Yee Gee* v. *U. S.* (83 Fed. 146–7) the bribe was not offered with a purpose of having the action of the person to whom it was offered, influenced as to anything that he might do under the *only office that he then held;* but was offered in the expectation of influencing probable action in *another office* which he expected to occupy soon afterward. This makes it plain that the case failed because he had *not been officially* appointed at the time the bribe was offered. The decision has no bearing on any question here involved.

In *United States* v. *Gibson* (47 Fed. 833) the bribe was offered to induce an internal revenue gauger to set fire to a distillery. The court properly held that the question whether he should or should not set fire to a building was in no wise related to any official function. Had he burned the building he would have committed arson under the State statutes, and in indicting him for arson it would not have been a material averment that he was a gauger.

In *United States* v. *Boyer* (85 Fed. 425), meat inspectors were required to condemn diseased carcasses and see to it that they were so rendered in vats on the premises, as that they could never become food products. A Federal inspector was offered a bribe to let carcasses so condemned be made up into sausages, etc. The duties of the inspector were imposed entirely by regulation, but the court did not dispose of the case on the lack of a Federal statute specifically prescribing the duties. On the con-

trary it decided that the case must turn on whether Congress or the State had the power of inspection. It determined that the State *alone* had the power, and that if Congress had by direct act undertaken to impose these duties the act would have been unconstitutional, and therefore the regulations equally were void.

In *Vernon* v. *United States* (146 Fed. 121) an employee of the Treasury Department, whose duties were not prescribed by any act of Congress, was offered a bribe to influence his action with respect to a duty to make recommendations to the Secretary of the Treasury as to a post-office site. No question raised but that it was a part of his official function to make such recommendation. He was convicted on trial and the case was reversed on the ground that the evidence failed to show any offer of money within the jurisdiction of the trial court, or even any offers of money at all.

The court below, confusing the question of official duty with the question of statutory definition of crime—and they are wholly independent questions—relied upon the following language of the court in *United States* v. *George* (228 U. S. 14, 22), "Where the charge is of crime it must have clear legislative basis." (No. 727, R., 26).

This court was then considering a charge of perjury under section 5392, Revised Statutes, which requires the oath to be in "any case in which *a law of the United States* authorizes an oath to be administered." There the very *definition* of the

crime required that the oath be *authorized by act of Congress.* Of course, no usage or departmental regulation requiring the oath could take the place of an act of Congress to constitute the crime as so defined. But we have here a very different question.

This court reached an opposite result in an earlier case (*United States* v. *Bailey,* 9. Pet., 251, 3, 4) also involving a charge of perjury under a statute reading: " If any person shall swear or affirm falsely touching the expenditure of public money," etc. There an act of Congress (4 Stat., 563), providing for the liquidation of the claims of the State of Virginia, required the Secretary of the Treasury to " adjust and settle those claims." Under this power the Secretary established a regulation that affidavits made before any justice of the peace would be received as evidence of claim. The court said:

> It is admitted that there is no statute of the United States which expressly authorizes any justice of the peace * * * to administer an oath in support of any claim against the United States (under said act) * * *.
>
> So that the solution of the question now before us depends upon this, whether the oath so administered under the sanction of the Treasury Department is within the true intent and meaning of the act of 1823 * * *. And we are of the opinion that the Secretary of the Treasury did, by implication, possess

> the power to make such a regulation, etc. * * *.
>
> And we think that such an oath administered under such circumstances would clearly be within the provisions of the act of 1823 (the perjury statute).

The contrary result is explained by the variance in the statutes *defining* the crime. On principle the two cases are in harmony. The case at bar is governed by the latter (Bailey) case.

Regardless of the *use to which the commissioner might put this recommendation and even if he never, in fact, used it at all*, it could be properly called for and if furnished by the special officer would be so furnished in the line of his duty; and an offer of money to induce a dishonest recommendation is within the inhibition of the act. Because it may be done without ascribing to the language other than its natural meaning, the act should be so construed as to fully guard against the evils aimed at.

CONCLUSION.

We submit that the act may naturally receive and should receive such a construction as will bring within their reach, respectively, the conduct charged against these several defendants; and that the judgment of the court below should be reversed with directions to overrule the respective demurrers and proceed with the causes.

WILLIAM WALLACE, JR.,
Assistant Attorney General.

FEBRUARY, 1914.

○

In the Supreme Court of the United States.

October Term, 1913.

UNITED STATES, PLAINTIFF IN ERROR, vs. WELLS N. BIRDSALL.	No. [illegible].

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

BRIEF FOR WELLS N. BIRDSALL.

STATEMENT.

The indictment in this case was based upon section 39 of the Federal Penal Code, which is set out upon page 2 of the brief for the United States.

No. 727.

In the Supreme Court of the United States

OCTOBER TERM, 1913

No. 727.

UNITED STATES, PLAINTIFF IN ERROR

vs.

WILLIS N. BIRDSALL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

BRIEF FOR DEFENDANT, WILLIS N. BIRDSALL

STATEMENT

There are two indictments in this case, one of which charges the defendant Willis N. Birdsall, with the payment of the sum of $50.00 to one Thomas E. Brents, a special officer of the United States for the suppression of the liquor traffic among Indians, with the intent, on the part of the defendant, to influence the decision and action of the said Thomas E. Brents on a question, matter, cause and proceeding then and there expected and intended, soon to be pending before him in his official capacity and in his place of trust.

The other indictment charges the payment by the defendant Willis N. Birdsall of $75.00 to one Everett E. Van Wert, who is alleged to have been a deputy special officer of the United States for the suppression of the liquor traffic among Indians, with intent, on the part of the said defendant, to influence the decision and action of the said Everett E. Van Wert on a question, matter, cause and proceeding then and there, expected and intended, soon to be pending before him in his official capacity and in his place of trust.

A demurrer was filed by the defendant to each of said indictments, and for the purposes of such demurrers and the Writ of Error herein, the two cases against the defendant were consolidated as cause No. 727 in this court.

In substance the indictment against the defendant Willis N. Birdsall alleges that Thomas E. Brents was appointed, by the Commissioner of Indian Affairs, as a special officer for the suppression of the liquor traffic among Indians, and that on the 30th day of April, 1910 and for more than a year prior thereto, was acting for and in behalf of the United States, in an official capacity, as such special officer, that according to the rules and regulations, and established us-

ages and practices of the Department of the Interior, it was the duty of the said Thomas E. Brents to, make recommendations to the superior officer or Commissioner of Indian Affairs, directly or through subordinates, concerning all matters connected with the conviction and punishment of persons unlawfully selling liquor to Indians, or otherwise violating the laws of the United States in reference to the liquor traffic affecting Indians.

The indictment then sets out, that at the April term of the District Court of the United States for the Northern District of Iowa, certain persons were indicted for unlawfully selling liquor to Indians in violation of the laws of the United States; that all of said persons so indicted entered a plea of guilty at the December term in the year of 1909 of said court, to the offense charged in said indictment; that at the April term, 1910 of said court each of said persons so indicted was sentenced, by the court, to pay a fine of $100.00 and to be imprisoned for a period of sixty days; that before such sentences were enforced, or executed, an application was made to the Judge of said court for a reduction of sentence and for a suspension of a part thereof; that the Judge of said court then and there announced that he would not change, reduce or suspend, such sentences or any part thereof, unless a recommendation to that effect was made to him by the Commissioner of Indian Affairs; that the United States District Attorney, for said district, announced that he would not recommend a commutation, or other executive clemency, unless a recommendation, to that effect, was made to him by the Commissioner of Indian Affairs. That it was and long had been, the settled usage and practice for United States Judges, in determining sentence and upon application for changes, reductions or suspensions thereof, to consult the United States Attorney and either directly, or through him an administrative

officer charged with the enforcement of the laws for the suppression of the liquor traffic among Indians, and that it was the settled usage and practice of the President, in the exercise of his power of extending executive clemency, to consult the Attorney General, and that it had been and was, a settled usage and practice of the Attorney General, for the purpose of advising the President, to consult with the United States Attorney, or other officer by whom the prosecution had been conducted.

That in order to give the persons, who had pleaded guilty, an opportunity to obtain from the Commissioner of Indian Affairs, a recommendation to the Judge for a reduction or suspension of said sentences, and a recommendation from the United States Attorney for the commutation of the sentences, or other executive clemency, the enforcement of such sentences was by the court held in abeyance.

That as provided by the rules, regulations, established usages, practices and requirements of the Department of the Interior, as provided by law, it was the duty of the Commissioner of Indian Affairs, to assist in the enforcement of the laws of the United States in reference to the liquor traffic affecting Indians, and that he was particularly charged with the duty, when requested to do so. to advise or make recommendations to any Judge, before whom any prosecution for the illegal sale of intoxicating liquors to Indians, may have been tried, and to the United States Attorney, or other officer, by whom such prosecutions had been conducted, concerning the effect upon the enforcement of such law, of any proposed leniency or clemency, in connection with the punishment of the persons found guilty of the offense thereunder.

That while such sentences were held in abeyance, the defendant Willis N. Birdsall, for the purpose of obtaining from the Judge of said court, a reduction or

suspension of such sentences, or a part thereof, and for the purposed of obtaining from the Commissioner of Indian Affairs a recommendation to that effect to said judge, and to the United States Attorney, gave and caused to be given to said Thomas E. Brents the sum of $50.00 with intent thereby, to influence the decision and action of said Thomas E. Brents on a question, matter, cause and proceeding then and there, expected and intended soon to pending before him and expected soon, by law, to be brought before him in his official capacity and in his place of trust and profit; that when application should be made to the Commissioner of Indian Affairs for recommendation of leniency or clemency, and when the Commissioner of Indian Affairs should call upon said Thomas E. Brents either directly or through subordinates, for information, report, advice or recommendation, the said Thomas E. Brents should have his decision and action influenced by the receipt, by him, of the sum of $50.00, so that he would falsely and without regard to truth, and contrary to his duty, mislead and misinform the Commissioner of Indian Affairs, and under the facts and circumstances officially known to him, advise that the Commissioner of Indian Affairs should, in the interest of the enforcement of the laws for the suppression of the liquor traffic among Indians, recommend to the Judge, or to the United States Attorney, or to the Secretary of the Interior, or to the Attorney General, or to the President, that leniency and clemency should be granted to the persons, or to some of them, who had pleaded guilty.

The other indictment is in all respects substantially the same, except that it charges the payment, by the defendant Willis N. Birdsall, of the sum of $75.00 to Everett E. Van Wert, for the purpose of, and in like manner influencing him in giving advice, either directly or indirectly, to the Commissioner of Indian

Affairs, the United States Attorney, the Attorney General, or the President, as to the exercise of clemency, by the Judge of the District Court, in relation to the persons who had pleaded guilty of the offense of selling intoxicating liquors to Indians.

To these indictments the defendant Willis N. Birdsall demurred. The demurrer, omitting the formal parts being as follows:

DEMURRER

I

That the facts stated and set forth in said indictment do not constitute any crime or offense under the Constitution and Laws of the United States.

II

That the facts set forth in said indictment do not charge the defendant with the offense of bribery, or with any other offence whatsoever, and wholly fail to set forth or allege any facts which constitute any offense or crime under the Constitution and Laws of the United States, or the regulations, practices and established usages of any department of the government, in this, to-wit:

First: That said indictment fails to charge, allege or set forth, that the said Everett E. Van Wert was an officer of the government of the United States, or that he was a person actin for or on behalf of the United States in an official function, or that he was acting by authority of any department or office of the government thereof, at the time of the alleged payment of money to him by the defendant, and that said indictment wholly fails to charge defendant with giving, or offering to give, to the said Everett E. Van Wert any

money or other thing of value, with intent to influence the said Everett E. Van Wert, while acting in any official function or under or by authority of any department or office of the government.

Second: That said indictment wholly fails to charge, allege or set forth that any matter, question, cause or proceeding was pending before the said Van Wert, in his official function, or before him as an officer of the United States, or as a person acting for or in behalf of the United States in any official function, or as a person acting under or by authority of any department or office of the government of the United States, at the time of the alleged act of the defendant which is chargod as bribery in said indictment, and affirmatively shows that no question, matter, cause or proceeding was pending before the said Everett E. Van Wert in his official capacity, and that no question, matter, cause or proceeding had by law been brought before him, or was pending before him, at the time of the alleged payment of money by the defendant to him, the said Everett E. Van Wert.

Third, That said indictment wholly fails to allege, set forth or charge that under any existing regulations of any department of the government, or under any settled practice or usage of any department thereof, it was the custom, practice or usage of any administrative or judicial officer of the government, to consult the said Everett E. Van Wert as to the reduction or suspension of any sentence, judgment or penalty imposed, or rendered by any Judge of the United States, upon any person or persons for a violation of the laws relating to the suppression of the sale of intoxi-

cating liquors to and among the Indians, and wholly fails to allege, set forth or charge that it was the duty of the said Van Wert, under any existing regulation, or under any established practice or usage of any department of the government, to recommend or advise the President of the United States, the Secretary of the Interior, the Attorney General, any Judge of the United States, any United States Attorney, or the Commissioner of Indian Affairs as to any sentence imposed upon any person or persons found guilty of violating the laws relating to the sale of intoxicating liquors to Indians, or as to extending any judicial clemency to such person or persons, and that such indictment wholly fails to charge that in receiving the money alleged to have been paid to the said Van Wert by the defendant, that said payment was received by the said Van Wert, or made by the defendant, for the purpose and with intent, to influence the said Van Wert in any matter he was required to decide, or which it was his duty to decide under the Constitution and Laws of the United States, or under any regulation or established practice or usage of any department of the government.

Fourth: That said indictment wholly fails to set forth or show, that it was any part of the official duty of the said Everett E. Van Wert, to advise the United States District Court, or any Judge thereof, or to recommend to such court or Judge, any change, reduction or suspension of any sentence imposod upon any person or persons found guilty of a violation of the laws of the United States relating to the sale of intoxicating liquors to Indians, or to advise or recommend judicial clemency

to any court of the United States, or to any Judge thereof in fixing and determining any sentence and punishment imposed by such court or Judge, upon a conviction of a violation of such laws.

Fifth: That said indictment affirmatively shows that the said Everett E. Van Wert was an employee of a department of the United States Government, wholly separate and distinct from that of the courts of the United States, to-wit: the Department of the Interior, and that no authority was conferred upon him by the Constitution and Laws of the United States, and that no duty was imposed upon him by the Constitution or Laws of the United States, or by any regulations, usages, or practices of any Department of the United States, to advise any court of the United States, or any Judge thereof, as to any change, reduction or suspension of any sentence imposed upon any person for a violation of the laws of the United States relating to the sale of intoxicating liquors to Indians, or to advise, or recommend to any such court or Judge, judicial clemency in fixing or determining any sentence or punishment imposed by such court or Judge, upon any person or persons convicted of a violation of said laws, and it further affirmatively appears upon the face of said indictment that said Van Wert had no power or authority to act upon, or to determine or decide as to any change, reduction or, suspension of any sentence imposed by any court of the United States, or by any Judge thereof, upon any person convicted of any violation of the laws of the United States, or to decide or determine whether judicial clemency should be extended to any such person

or persons so convicted. And that the courts of the United States or the Judges thereof, were not bound or obligated to receive, accept, carry out, or act upon any recommendation or advice of the said Van Wert which he might make, or give as to any sentence imposed or any judicial clemency extended, as to any person found guilty of violating said laws.

Sixth: That said indictment upon its face further affirmatively shows, that any attempt, upon the part of the said Van Wert, to suggest or recommend to the Courts of the United States, or to the judges thereof, what any action upon the part of such courts should be, as to imposing sentences upon any person or persons found guilty of violating the laws relating to the sale of intoxicating liquors to Indians, would be an act on the part of the said Van Wert wholly outside of and beyond any official power, function or duty of the said Van Wert as a special officer of the Department of the Interior, and that such courts or Judges thereof, would be under no obligation whatever legal or moral, to listen to or follow any such suggestion, recommendation or advice, or to be governed thereby in fixing any sentence imposed upon any person or persons, by such courts, for the violation of the laws relating to the sale of intoxicating liquors to Indians, or in extending to such person or persons any judicial clemency; and that any recommendation, suggestion, or advice of the said Van Wert so given, or attempted to be given, to said courts or judges would be a recommendation, suggestion, or the advice of the said Van Wert as a private person, and in his character as a private citizen and not

as an officer of the government or of any department thereof. That no such recommendation, suggestion, or advice could be given by the said Van Wert while acting for or in behalf of the United States in any official function, or by authority of any Department or office of the government thereof, for the reason that such action on the part of the said Van Wert would be an attempt, upon the part of an employee of one branch of the government, unlawfully to influence the action of an officer of a co-ordinate branch of such government and would be contrary to, and in violation of public policy, and the long established usuages of the respective departments of the Government of the United States.

Seventh: That said indictment wholly fails to set forth or charge, that the money alleged to have been paid, by the defendant, to the said Van Wert, was paid by the defendant, with the intent on the part of said defendant, of influencing the said Van Wert in his decision, or in his action of or upon any question, matter, cause or proceeding which was at that time, pending, or which had been by law brought before him, the said Van Wert, in his official capacity or in his place of trust or profit, or with intent to influence him, the said Van Wert, to commit or aid in committing, or to collude in or allow any fraud, or permit any opportunity for the commission of any fraud upon the United States, or to induce him to do. or omit to do any act in vialation af his lawful duty. And said indictment affirmatively shows upon its face that the money alleged to have been paid by the defendant, to the said Van Wert, was not paid,

by the defendant, to said Van Wert with the intent on the part of said defendant, to influence the said Van Wert in his decision or action on, or as to any question, matter, cause or proceeding which was pending before him, the said Van Wert, or which had been by law brought before him in his official capacity or function, or in his place of trust and profit. as to which the said Van Wert had jurisdiction, or as to which the said Van Wert had any power or authority to decide, or upon which the said Van Wert had any power or authority directly or indirectly, in any manner to act; or with intent to influence him, the said Van Wert to commit or aid in committing, or to collude in or allow any fraud, or to make any opportuniy for the commission of any fraud on the United States, or to induce him to do, or omit to do, any act in violation of his lawful duty.

In the District Court this demurrer was treated as being made and entered to both indictments and should be so treated upon the consolidation of the cases as presented to this court. The demurrer was sustained by the District Court, the defendant discharged and his bail exonorated. The case now comes before this court upon a Writ of Error directed to the District Court.

ARGUMENT

I

The ground upon which the demurrer was sustained by the learned District Judge is: that the Department of the Interior or the Bureau of Indian Affairs have no power or authority whatsoever conferred or imposed by any Act of Congress, to recommend to the judicial department of the government whether

judicial clemency shall or shall not be extended, or shall or shall not be withheld from any person convicted of selling intoxicating liquors to Indians, or for any other offense against the laws of the United States; that rules, regulations, usages and practices of a department of the government, can only be promulgated and established, for the purpose of facilitating the transaction of the business of the department under or by virtue of the power conferred upon the head of the department by an Act of Congress; that the rules, regulations, usages and practices can only be effective within the department where promulgated; that no rule, regulation or usage can have any force outside of the department in which such rule, regulation or usage has been established under the authority of an Act of Congress; that no rule, regulation or usage existed, or could exist, in the Department of the Interior, under any Act of Congress whereby it became the official duty of any officer, or any employee of such department, to advise any judge of the United States Court as to what sentence, or penalty, should be imposed ,or inflicted, upon any person convicted of an offense against the laws of the United States; that although the learned district attorney who drew the indictment has alleged the existence of rules, usages and practices in the Department of the Interior under which, as alleged in such indictment, the officers and employees of such department are to advise the judges of the courts of the United States, as to their official duties in imposing sentences upon persons convicted of a violation of the laws of the United States, such allegations are utterly without force in charging any offense, on the part of the defendant, for the reason that no such rules, regulations, usages or practices could lawfully be established, or promulgated, by any officer of such department or be in force within such department;

and that it follows as a logical conclusion that no violation of such alleged rules, regulations, usages or practices of such department could constitute a crime.

As a corollary thereof, it could not be a crime against the United States to give to an employee of such department money, or other thing of value for the purpose of inducing him to violate such alleged rules, regulations, usages or practices, or any of them.

The decision of the learned judge of the court below and the grounds upon which it is based, are, as we believe logically sound and will stand the test of investigation and analysis.

With all due deference to the learned district attorney who drew the indictment, and to the learned assistant Attorney General who prepared the brief for the United States, the contention, that an employee af the Interior Department of the government could act, within his official functions, under any rule, regulation or usage of the department in which he is employed, in advising, either directly or indirectly, what action should be taken by a judge of the United States Court, in imposing sentence upon a person convicted of an offence against the United States, or in exercising judicial clemency as to such person, appears to us absurd.

The power and duty of imposing punishment upon persons convicted of an offense against the laws of the United States is, by the Constitution, lodged and vested solely in the courts of the United States. Van Wert was a subordinate employee of another department of the government, wholly separate and apart from the Judicial Department, and no rule, regulation, custom or usage of the Department of the Interior could clothe him with authority to advise, directly or indirectly, the judges of the courts of the United States as to the extent of punishment, if any, which should be inflicted upon persons

convicted of an offense against the United States, or make it any part of his official duty to offer, or give, such advice.

II

The Commissioner of Indian Affairs is an officer of the executive branch of the government. His duties are prescribed by Section 463 of the Compiled Statutes of the United States and are in substance, that he shall have the management of all the Indian affairs and all matters growing out of Indian relations, under the direction of the Secretary of the Interior, agreeable to such regulations as the President may prescribe. The duties of his office pertain to a branch of the government entirely separate from and independent of, the judicial department. No regulation could be prescribed by the Secretary of the Interior or by the Commissioner of Indian Affairs, nor could any usage be established in that department of the government, which would have the force or effect of law upon the judicial branch of the government, or upon any judge thereof. Any such regulation, rule, or practice, so attempted to be promulgated or established, by any officer of the Department of the Interior must of necessity be absolutely void.

It therefore logically follows that the said Van Wert could not act in any official function, nor within any lawful duty, which he could by any rule, regulation or usage of that department be required to perform, in attempting either directly or indirectly to advise what action should be taken by the judges of the United States courts, in imposing sentence upon persons convicted of a violation of the laws of the United States, or in extending to, or withholding from such persons judicial clemency.

III

Under Section 39 of the Federal Penal code an attempt to bribe an officer of the United States, or a

person acting for or in behalf of the United States in an official function under or by authority of the department or office of the government, must be for the purpose and with the intent, to influence such officer or person, in his decision or action, on a question, matter or proceeding which may at any time be brought before him in his official capacity and in his place of trust and as to which he has power to act.

The provisions of this section apply only to an officer of the United States, or to a person acting for or in behalf of the United States in an official function, under or by authority of the department or office of the government, as to a question, matter, cause or proceeding, pending before such officer, or person, or which may be by law brought before him, and as to which he has power to act or decide in his official capacity, or in his place of trust.

In other words, to constitute the crime of bribery, or attempt to bribe, under the provisions of Section 39, the person to whom such bribe is offered or paid, must be an officer of the United States, or a person acting for or in behalf of the United States in an official function under or by authority of the department or office of the government, and, must have power to act upon, or to decide, in his official capacity or in his official function, the matter, question, cause or proceeding as to which he is sought to be influenced by such bribe.

If the matter as to which he is sought to be influenced by the payment of a bribe, is not one which is pending before him, or which may be by law brought before him in his official capacity or in his place of trust, or as to which he has no power to act or decide, then the payment of such bribe, or the offer of payment, is not an offense under Section 39.

This construction of the section referred to, is in harmony with all the decisions of the courts of the United States and is sound upon principle.

No person can be convicted of the crime of bribery unless he has paid to an officer, or to some one acting in an official capacity or in an official function, something of value, for the purpose of influencing the decision, or action of such officer or person, as to some matter which he has the power to act upon, or to decide.

In the case at bar it will be conceded, that the question of the extent of punishment to be imposed upon persons convicted of violating the laws of the United States relating to the sale of intoxicating liquors to Indians, and the question whether clemency should or should not be extended to such persons, could only be pending legally before the courts of the United States, and could only be decided and determined by the judges of such courts.

It must further be conceded that such questions were not and could not be pending before the Department of the Interior, or before the Commissioner of Indian Affairs, and certainly not before the said Van Wert, a subordinate employee of that department. Such questions could not by any possibility be brought before the said Van Wert, in his official capacity or in his place of trust, nor could he take any action or make any decision in relation thereto.

There is therefore no escape from the conclusion, that any advice or suggestion, made by Van Wert, to any superior officer of the Department of the Interior, or of any Judge of the United States Courts, as to the action or decision of such judge, in imposing sentence upon, or extending judicial clemency to, persons found guilty of violating the laws of the United States relating to the sale of intoxicating liquors to Indians, would simply be the suggestion or advice of a private individual and not that of an officer of the government, or of any person acting for or in behalf of the United States in any official function under or by authority of any depart-

ment or office of the government, in relation to any question, matter, cause or proceeding pending before him or which might be brought before him in his official capacity or in his place of trust.

This construction of Section 39 has full support in the following cases:

United States v. Gibson, 47 Fed. 833
In re Yee Gee, 83 Fed. 185
United States v. Boyero, 85 Fed. 485
United States v. George, 228 U. S. 14

As bearing upon this question see also

Vernon v. United States, 146 Fed. 121

IV

No case cited by the United States lays down a rule different from that for which we contend, nor do we believe that any case can be found announcing or upholding a different construction of the Statute.

In the case of *Curley v. United States*, 130 Fed. 1, the defendant was indicted for conspiracy against the United States. The indictment was in three counts. The first charged a conspiracy to defraud the United States under Section 5440, the second charged a conspiracy to commit an offense against the United States under Section 5418 of the Revised Statutes, and the third charged a conspiracy to commit an offense against the United States under Section 5418, to-wit, to present a false writing to an officer of the United States.

The facts upon which the indictment was found, briefly stated, are these: One Hughes, desiring to procure an appointment as letter carrier, agreed with Curley that he, (Curley) should falsely impersonate Hughes and take a civil service examination, and do all acts required by a board of examiners, and sign the name of Hughes to such examination paper as should be delivered to Curley while he should impersonate Hughes. That Curley in pursuance of such conspiricy did falsely and for the purpose of

defrauding the United States make a certain writing known as a declaration sheet.

The learned judges of the Circuit Court of Appeals held, that such a fraudulent agreement between Hughes and Curley, was a conspiracy to defraud and deceive, and such holding is undoubtedly a correct exposition of the law, but the case has no bearing upon any question involved in the one at bar.

It is said by counsel for the United States, (page 6 of brief) "***Haas v. Henkle***, 216 U. S. 462, 480 disposes of the case." As we read the decision in ***Haas v. Henkle*** it is very far from disposing of the questions presented in the case at bar.

In ***Haas v. Henkle*** defendants were indicted for conspiracy to commit an offense against the United States under Section 5440 of the Revised Statutes. The specific offense charged in the indictment was, that the defendants conspired with one Holmes, an associate statistician of the Bureau of Statistics, to have Holmes furnish the defendants with certain false cotton crop reports in advance of the official publication of the information contained in such reports, in violation of the rules and regulations of the Department of Agriculture, which prohibited the employees of that Department from giving out any information, relating to the crops of the country, in advance of the publication of the reports in relation thereto.

The rules and regulations promulgated by the Secretary of Agriculture, for the government of the employees of that Department, and for the purpose of facilitating the transaction of the business therein, were authorized by an Act of Congress and had the force and effect of law within such Department. Any act of an employee of the Department which violated such rules and regulations was an unlawful act, and if two or more persons conspired to have an employee of that Department do an act prohibited by the

rules and regulations of the Department, the persons so conspiring were guilty of a conspiracy to defraud the United States and could be indicted and punished for the crime of conspiracy under Section 5440. Haas and others were therefore legally indicted and properly held by this court to have been guilty of the crime of conspiracy.

As suggested, the rules and regulations, promulgated by the Secretary of Agriculture, for the government of the employees of that department, were directly authorized by an Act of Congress, Section 161, Revised Statutes. A rule or regulation that no employee of that department should give out any information, relating to the condition of the cotton crop, in advance of the publication of the report of the department was directly authorized by an Act of Congress and was a law within the department.

In the case at bar there is no Act of Congress which authorizes the Secretary of the Interior, as an officer of the executive department of the government, to prescribe or promulgate any rule or regulation whereby such officer assumes to advise what action shall be taken by the Judges of the Judicial Branch of the government, as to matters wholly within the jurisdiction of such Judicial Department.

The distinction between the case of ***Haas vs. Henkle*** and the case at bar, is therefore clear. In the one case the regulation prescribed by the Secretary of Agriculture was legally in force within that department. In the case at bar the regulation, rule and usage alleged in the indictment to have been established by the Secretary of the Interior, could not legally have been prescribed, established or promulgated, because such rule, regulation or usage is not authorized by any Act of Congress and could not exist within the department.

The case of ***Benson vs. United Sates*** 27 D. C. App, 331-334-345 is in the line with ***Haas vs. Henkle*** and

is no more decisive of the questions presented in this case than is the latter case. The indictments in each of these cases are based upon a different provision of the statute, for a wholly different offense, and, are not controlling as to the questions here presented.

In ***Sharp vs. United States,*** 138 Fed. 878, the defendant was an Indian Agent acting within the scope of his official duties, as such agent, and therefore the acceptance of the bribe, to influence such action, fell directly within the provisions of Section 5451 of the Revised Statutes.

In ***United States vs. VanLeuven,*** 62 Fed. 62, it was held, that a person not an officer of the government, might act officially, where authority to so act, was conferred upon him by the department under which he was acting, and this rule is reaffirmed in ***United States vs. Ingham,*** 97 Fed. 355.

All of these cases were cited upon argument of the demurrer in the court below and were carefully considered by the learned Judge of that court. They are not in point and not decisive of the question here presented.

V

All that is said in the cases of ***Haas vs. Henkle, Benson vs. United States, Sharp vs. United States, United States vs. McDaniel,*** and other cases cited by counsel for the United States, in relation to the duties of government employees; and that such duties may be determined by departmental usages and regulations and are not limited to those specifically defined by statute, is conceded as matter of course, but the question presented by the demurrer, is wholly outside of and beyond any question raised or determined in such cases.

The question here presented is:

Has Congress conferred upon the Secretary of the Interior, or upon the Commissioner of Indian Affairs, any power or authority, to promulgate any rule, or to

establish any usuage or practice whereby it becomes the official duty of the Secretary of the Interior, the Commissioner of Indian Affairs or of any subordinate employee ot the Interior department, to advise the judges of the courts of the United States, as to what punishment shall be inflicted upon persons guilty of a violation of the laws of the United States relating to the sale of intoxicating liquors to Indians?

The contention of the defendant is, that no such power or authority has ever been conferred upon any officer of the Department of the Interior, by any Act of Congress, and, that Congress itself can not under the Constitution of the United States confer such power of authority.

Section 161 of the Revised Statutes of the United States provides:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of its department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, preservation of the records, papers and property appertaining to it."

This section authorizes the Secretary of the Interior to prescribe regulations not inconsistent with law, for the government of his department, the conduct of the officers and clerks and the distribution and performance of the business of the Department. It does not authorize the Secretary of the Interior to establish, or prescribe rules or regulations, whereby he undertakes, by himself, or his subordinates, to advise, as to the business and affairs of any other department of the government, or to direct or control the transactions of such business and affairs.

It could be urged with equal force and plausibility, that the Secretary of the Interior, under the section of the statute quoted, has power to prescribe and promulgate a regulation, within the Interior department, that he should advise the President of the

United States, as to any executive act of such chief magistrate, before such act was performed by him, as that a rule or regulation can be prescribed by such Secretary that he, or his subordinates, should advise the Judges of the courts of the United States, as to their action, in cases pending within the judicial department of the government. Any such rule or regulation, so attempted to be prescribed or promulgated, by the Secretary of the Interior, would be an absolute nullity, and no employee of such department, in attempting to act under or by virtue of such rule or regulation, would be acting within his official capacity, or performing any official function imposed upon him by law or by any valid regulation of any department of the government.

It therefore follows that if such a regulation or rule were attempted to be established, or promulgated by the Secretary of the Interior, a breach thereof, by any employee of the department, would not be a violation of law, or a violation of any rule of the department lawfully established or prescribed; and that the payment of money, or other thing of value, to an employee of that department for the purpose of inducing him to violate such illegal and unlawful rule or regulation, would not be bribery.

VI

In conclusion it is most earnestly urged:

First: That the money charged to have been paid by the defendant to Brents and Van Wert, was not paid to them with intent to influnce their action or decision on any question, matter or proceeding which had been or could be brought before them, or either of them, in his official capacity, or in his place of trust, and as to which they, or either of them, had power to act or to decide in his official capacity or in his official function.

Second: That no rule, regulation or usage of the Department of the Interior, could be prescribed,

promulgated or established by the Secretary of the Interior, or by any other officer of that Department, under any Act of Congress, whereby it became the official duty of the Secretary of the Interior, or of any subordinate of that Department, to advise what action should be taken by the Judges of the courts of the United States, in relation to the punishment of any person or persons, convicted of the offense of selling intoxicating liquors to Indians in violation of law. That any attempt on the part of the Secretary of the Interior. to prescribe or promulgate any such rule or regulation, or to establish any such usage, would be a nullity, the rule or regulation attempted to be prescribed or promulgated, would be void and no employee of the Department would be guilty of a violation of his official duty in disregarding such void rule or regulation.

And as a logical conclusion, no one would be guilty of the crime of bribery by the payment of money, or other thing of value, for the purpose of inducing an employee of the Department to violate such void rule or regulation.

Third: The decision of the learned Judge of the District Court is in harmony with the principles announced in the cases decided by this court, and the ruling the court below upon the demurrer interposed by the defendant should be affirmed.

CHARLES W. MULLAN
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Attorneys for defendant, WILLIS N. BIRDSALL

CHARLES W. MULLAN
of counsel for
defendant BIRDSALL

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In the Supreme Court of the United States

OCTOBER TERM, 1913.

UNITED STATES PLAINTIFF IN ERROR
vs.
WILLIS N. BIRDSALL
No. 727

In Error to the District Court of the United States for the Northern District of Iowa

BRIEF FOR WILLIS N. BIRDSALL UPON RE-ARGUMENT

CHAS. W. MULLAN and H. B. BOIES
Attorneys for Defendant

In the Supreme Court of the United States

OCTOBER TERM, 1913.

No. 727

UNITED STATES PLAINTIFF IN ERROR

vs.

WILLIS N. BIRDSALL

In Error to the District Court of the United States for the Northern District of Iowa

BRIEF FOR WILLIS N. BIRDSALL UPON RE-ARGUMENT

CHAS. W. MULLAN and H. B. BOIES
Attorneys for Defendant

I.

If it shall be suggested that the demurrer admits the existence of the rules, regulations and usages alleged in the indictment to exist in the Department of the Interior, a sufficient answer to such suggestion is: That the demurrer only admits the allegations of the indictment which are well pleaded; and that it does not admit a conclusion of law.

U. S. vs. Ames, 99 U. S. 35-45.

Interstate Land Co. vs. Maxwell Land Co., 139 U. S. 569-578.

Com. vs. Trimmer, 84 Pa. St. 65.

It is a demand, of the judgment of the court, whether under the allegations of the indictment, the defendant is bound to set forth any defense.

It presents the question of the power of the Secretary of the Interior to promulgate the rules and regulations alleged to exist, as well as the question, whether any such rules or regulations which the Secretary of the Interior may have attempted to prescribe, have any force as a valid law.

The question which the court must determine is: Does any valid law of the United States make the defendant guilty of the crime of bribery under the facts set forth in the indictment?

The facts set forth in the indictment are of course admitted, but the existence of any valid law of the United States which makes the acts of the defendant a crime is challenged by the demurrer.

If the Secretary of the Interior had no power under an act of Congress to prescribe the rules and regulations alleged to exist, then any such rules or regulations attempted to be promulgated by him, have, in legal contemplation no existence. It therefore follows that no indictment can be based upon an alleged violation of such rules and regulations; and, the demurrer squarely raises

the question of their existence, and of their validity, if any attempt was ever made by the Secretary of the Interior to promulgate or establish such rules.

II.

The power conferred upon the Secretary of the Interior to prescribe regulations for the government of his department, under Section 161 of the Revised Statutes of the United States, is administrative only, and is confined strictly to the transaction of business within his department. No power is conferred by any act of Congress which authorizes the Secretary of the Interior to establish any rule or regulations which can have any force outside of the Department of the Interior, or which does not relate directly to the administration of the business of the Department.

In the case of the *United States vs. George*, 228 U. S. 14, at page 20, in defining the power conferred by Section 161 of the Revised Statutes, it is said:

"It will be seen that they confer administrative power only. This is indubitably so as to sections 161, 441, 453 and 2478."

At page 122, it is further said:

"In other words, a distinction between the legislative and administrative function was recognized and enforced, And, similarly, this distinction must be recognized and enforced in the case at bar. The distinction is fundamental. Where the charge is of crime, it must have clear legislative basis."

In the instant case, the defendant is accused of bribing an employee of the Department of the Interior to violate a rule alleged to have been established by the Secretary of the Interior, under the power conferred by Section 161. The power to establish such regulations must, therefore, be strictly construed. It must expressly be given by statute.

The power of the Secretary of the Interior to establish any rule or regulation, the violation of which may become the basis of a criminal charge, is not a power which can be implied, and, unless expressly given, does not exist.

The rule alleged to have been established by the Secretary of the Interior, upon the alleged violation of which the indictment in this case is based, is not a rule relating to the administration of the business of the Department of the Interior.

It is not a rule within the Department, itself, or, for the government of the officers, clerks and employees of that Department, in the transaction of the business within the Department.

It is a rule by which the Secretary of the Interior and the Commissioner of Indian affairs, as alleged in the indictment, undertake by themselves, or their subordinates, to advise the officers of another Department of the Government, as to acts of such officers, in the administration of the business of their Department.

When the grand jury returned indictments against the persons accused of the unlawful sale of intoxicating liquors to Indians, all matters relating to such accusation, or, in any manner connected therewith, passed from the jurisdiction of the Department of the Interior, into the jurisdiction of the Judicial Department of the Government. When the investigation of the matter of the sale of intoxicating liquors to Indians, in violation of law, passed from the jurisdiction of the Department of the Interior to the Judicial Department of the Government, no rule or regulation which the Secretary of the Interior could lawfully establish under Section 161, could have any application to such investigation. The matter was then wholly within the jurisdiction of the Judicial branch of the Government, and subject only to the laws of the United States, and the rules and regulations of that Department. It must, therefore, logically follow that any alleged rule or regulation of the Department of the Interior, under, or

by which the Secretary of the Interior, or the Commissioner of Indian affairs, claim the right to follow such investigation into another Department of the Government, and advise the officers of such Department in relation thereto, is wholly beyond the power conferred by Congress, and absolutely void.

III.

The distinction between the case at bar, and that of *Haas vs. Henkle,* 216 U. S., 462, is wide and clear.

In Haas vs. Henkle, the defendant was indicted for a conspiracy to defraud the United States by inducing an employee of the Department of Agriculture to violate a rule, established by the Secretary of Agriculture, under the power expressly given by Section 161 of the Revised Statutes. The rule as to which the conspiracy of the defendant related, and which he sought to have an employee of the Department of Agriculture violate, was clearly an administrative rule, governing the transaction of business of the Department. It was only effective within that Department. Under such rule, it was a part of the official duty of Holmes, the employee, to refuse to give out any information, which the Department had obtained, as to the crop conditions of the country.

Haas and others conspired to induce Holmes to give to them advance information as to the condition of the cotton crop in the United States, in direct violation of the official duties of Holmes, as defined by a valid regulation established by the Secretary of Agriculture. The defendant Haas was therefore guilty of an offense against the laws of the United States, because of his conspiracy to defraud the Government, through an act of an employee of the Department of Agriculture, which act was a violation of the official duty of such employee, because of the existence of a rule within the Department, established by the Secretary of Agriculture, under the power expressly given by Section 161.

The entire transaction was wholly within the jurisdiction of the Department of Agriculture, and no attempt was made by the Secretary, or any other officer of that Department, to give to any rule or regulation, established by the Secretary of Agriculture, extra-jurisdictional effect.

The distinction between the case of Haas vs. Henkle, and the case at bar, is therefore, obvious. In Haas vs. Henkle, this court gave to a rule, duly established by the Secretary of Agriculture, under the power conferred by Section 161, the force of law within the Department where such rule existed. In this case, the Government is attempting to give to a rule, alleged to have been prescribed within the Department of the Interior, the force of law outside of that Department. The case of Haas vs. Henkle, is, therefore, not in point, nor, is it controlling upon any question which arises in the case at bar.

IV.

If it shall be urged in behalf of the prosecution that the rule alleged to exist in the Department of the Interior only required a subordinate or employee of that Department to make a truthful report to the head of the Department, as to the facts relating to the sale of intoxicating liquors to Indians, by the persons convicted of that offense in a court of the United States, and that the report required under the alleged rule was a report by an employee of the Department of the Interior, to his superior officer, and therefore, wholly within the Department; and, because within the Department, the rule requiring the report was valid, under the power conferred by Section 161, the sufficient answer to such contention is that the report, if any, which was required to be made under the alleged rule, did not relate to any business existing in the Department of the Interior, and that the Secretary of the Interior, under Section 161, has no power to establish any rule requiring any subordinate or any employee of that office,

to make a report to him, truthfully or otherwise, which relates to business wholly foreign to the Department of the Interior.

It could, with equal force, be urged on the part of the Government that the Secretary of the Interior has the power, under Section 161, to establish a rule within his Department, requiring his subordinates and the employees of such Department, to report to him all of the facts, involved in any case, which might come before this court for its decision, or, to report all of the facts and circumstances involved in the sale of bonds of the United States by the Secretary of the Treasury.

If the contention of the Government is upheld, there is no limit to the power of the head of a Department of the Government to require his subordinates or the employees of his Department, to interfere with the transaction of the business of the other Departments of the Government.

Interference by the head of one Department of the Government with the business of another Department was never contemplated by Congress when Section 161 was enacted, and the language of that section confines the power of the heads of the Departments of the Government strictly to the business within such Departments.

It may be argued in behalf of the Government that the business relating to the sale of intoxicating liquors to Indians by the persons who were indicted and convicted of that offense in Federal court, originated in the Department of the Interior, and therefore, the head of that Department had the right to require an employee to make a report as to the facts involved in the transaction, after the matter had passed from the jurisdiction of the Department of the Interior and into the jurisdiction of the courts of the United States.

If such position shall be taken by the Government, the clear and conclusive answer thereto is, that no power is conferred upon the Secretary of the Interior to follow

any matter which, is, by law, transferred from his Department to another Department of the Government.

It is wholly immaterial that the matter originated in the Department of the Interior. When, by operation of law, such matter was transferred from that Department to the Judicial branch of the Government, the power of the Secretary of the Interior to direct, control or advise as to any action in relation thereto, was terminated. The matter was then completely within the jurisdiction of one of the courts of the United States, and the Secretary of the Interior had no more power to direct or advise what action such court should take, than he would have had as to any matter which originally arose wholly within the jurisdiction of that court.

V.

The reasons urged as to the invalidity of any rule of the Department of the Interior, under which the officers of that Department claim the right to advise as to business wholly within the Judicial Department of the Government, applies with equal force to any alleged rule under which the Secretary of the Interior, or any subordinate of that Department, claims the right, either directly or indirectly, to advise any other officer of a separate Department of the Government, or the President of the United States, as to what action such officer or the President shall take, in relation to any matter coming before such officer, or before the President for his decision.

No rule, regulation, or usage can be promulgated or established by the Secretary of the Interior, under which he would have authority to advise an officer of another Department of the Government, or the President of the United States, in relation to any matter pending in another Department, or before the President.

This is manifestly so clear, that further argument seems unnecessary; and, it is not believed by the writer,

that the Government will claim that any such power is conferred upon the Secretary of the Interior by any Act of Congress.

VI.

The Act of Congress, of March 2nd, 1907, under which the Government, by a writ of error, has brought this case to this court, is as follows:

> "That a writ of error may be taken by and on behalf of the United States, from the District Court, or Circuit Courts, direct to the Supreme Court of the United States, in all criminal cases, in the following instances, to-wit: From a decision or judgment quashing, setting aside, or sustaining a demurrer to any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded. From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded: From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy. The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered, and shall be diligently prosecuted, and shall have precedence over all other cases. Pending the prosecution and determination of the writ of error in the foreging instances, the defendant shall be admitted to bail on his own recognizance: Provided, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant."

We submit to the court, the question, whether this case can be reviewed by this court upon a writ of error, under this Act of Congress.

The Act permits a writ of error to be taken in behalf of the United States from the District or Circuit Courts, (1) from a decision or judgment quashing, setting aside, or sustaining a demurrer to any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded; (2) from a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded: (3) from the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

The contention of the defendant is, that this case is not one of the classes of cases, named in the Act, which may be reviewed by this court upon a writ of error.

The first class, named in the Act of Congress, in which the decision or judgment of the court below, may be reviewed upon writ of error, is, those cases wherein the indictment has been quashed, set aside, or a demurrer sustained thereto, by the judgment of the lower court, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

The decision of the learned Judge of the District Court in the case at bar was not based upon the invalidity of any statute of the United States upon which the indictment is founded.

The question of the validity of any statute was not drawn into the decision of the District Court, and no statute was held by such court to be invalid; nor, was the construction of any statute, upon which the indictment is founded, involved in such decision.

The indictment is founded upon Section 39 of the Federal Penal Code, which is set out upon page 2 of the Brief for the United States.

The decision upon the demurrer involved no construction of this statute and its validity is conceded. The decision of the court was based upon the broad ground, that no rule, or regulation, attempted to be established by the Secretary of the Interior can have any force outside of that Department; and, that the allegations of the indictment charging the payment of money by the defendant to an employee of the Department of the Interior, for the purpose of inducing such employee to violate a rule alleged to exist within such Department, relating to a matter wholly outside of, and beyond the jurisdiction of the Department of the Interior, did not constitute the crime of bribery. In other words, that the facts set forth in the indictment did not constitute the crime of bribery under any existing valid rule or regulation of the Department of the Interior.

The second and third classes named in the Act of Congress, which are reviewable upon a writ of error, are so clearly distinguishable from the case at bar, that it is unnecessary to discuss them.

If it shall be urged that the decision of the court below involved the validity, or the construction of certain rules and regulations alleged to have been prescribed by the Secretary of the Interior, the answer to such contention is, that the statute upon which the indictment is founded is a penal statute which must be strictly construed in every particular, and that a writ of error is only permitted, on the part of the Government, in cases where a statute of the United States has been held to be invalid, or where the construction of a statute is involved in the decision of the court. No provision is made for a writ of error in any criminal action wherein the validity, or the construction of any rule or regulation prescribed by the head of any Department of the Government is involved. Congress has clearly specified the cases reviewable upon a writ of error, and such specification excludes all cases not falling within the classes named in the Act.

If it shall be urged that the alleged rules and regulations are based upon Section 161, and that the construction of that statute was therefore drawn into the decision of the District Court, the conclusive answer is, that the indictment is not founded upon that section, and a writ of error lies only in a case in which the validity, or construction of the statute upon which the indictment is founded, is involved in the decision of the lower court.

United States vs. Keitel, 211 U. S., 371, 398-399.

United States vs. Stevenson, 215 U. S., 190-195.

In presenting this question it is fair to say that no case has been found directly sustaining the contention of the defendant; but it seems to us that the intention of Congress in passing the Act referred to, was to give to this court the right to review upon writs of error, certain criminal cases, wherein the validity or construction of the statute, upon which the indictment was founded, was involved in the decision of the lower court, and in no other cases, except those defined in the second and third classes specified in the Act, within which, it will be conceded, the instant case does not fall.

It further appears to us clear that the question of the validity, or construction of the statute, upon which the indictment in this case is founded, was not involved in the decision of the lower court, and, therefore, the decision cannot be reviewed on a writ of error.

We concede the validity of the statute; no construction of its provisions was necessary to the decision of the District Court, and none was given to them by that court; the decision was based wholly upon the invalidity of the rules alleged to exist in the Department of the Interior, and it therefore, logically follows, that such decision cannot be reviewed by this court upon a writ of error.

If this contention is sound, the Government has no standing in this court, as the question is jurisdictional, and may, therefore, be raised at any stage of the proceeding.

IN CONCLUSION, we submit that the decision of the learned Judge of the District Court sustaining the demurrer of the defendant, is correct under the rules of law governing the facts as set forth in the indictment, and such decision should, as we firmly believe, be affirmed by this court.

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